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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JAMES NOEL FLANAGAN, Defendant and Appellant.	B214885 (Los Angeles County Super. Ct. No. NA 072111)

APPEAL from a judgment of the Superior Court of Los Angeles County, John David Lord, Judge. Affirmed with directions.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

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James Noel Flanagan appeals his conviction of robbery, attempted robbery, burglary, assault with a deadly weapon and carrying a concealed dirk or dagger. He contends the evidence was insufficient to support two of the robbery convictions, the court erred in sentencing him to concurrent terms for both burglary and the underlying robberies and the sentences for the burglaries must be stayed under Penal Code section 654.[1] Respondent asks this court to make certain corrections to the abstract of judgment, and appellant does not oppose the request. We affirm the judgment but direct the superior court to order the clerk to modify the abstract of judgment to stay the sentence on the burglary convictions and make further modifications as directed in this opinion.

PROCEDURAL HISTORY

A first amended information charged appellant in 29 counts and alleged (1) as to all but three counts, that he personally used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1); and (2) as to all counts, that he had suffered three prison priors. In a bifurcated trial, a jury convicted appellant of all counts and found the dangerous weapon enhancement true as to all charged counts. After the trial court denied appellant's motion for new trial, appellant waived a jury trial on the issue of his priors. The court then found two of the prison priors to be true.

The trial court sentenced appellant to a total prison term of 24 years eight months.

Appellant timely appealed.

FACTS

Appellant was charged with committing nine robberies or attempted robberies during the period from July 9, 2006, to October 23, 2006. He was convicted of (1) robbing the same Taco Bell located in Long Beach on July 9, 2006, September 17, 2006, and September 23, 2006; (2) robbing the same Jack in the Box in Long Beach on September 24, 2006, October 7, 2006, October 15, 2006, October 19, 2006, and October 23, 2006, and attempting to rob the same restaurant on October 23, 2006, during

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[1] All further statutory references are to the Penal Code.

which attempt he was apprehended; and (3) robbing a Burger King in nearby Bellflower on October 14, 2006. Each of these robberies was paired with a burglary.

All of the robberies and the attempted robbery presented much the same scenarios, and numerous witnesses (some subjected to multiple robberies by defendant) testified to the particulars of the events. For example, in the first robbery on July 9, 2006, appellant walked into the Taco Bell restaurant wearing a black baseball hat and a bandana over his face and holding a large knife in his hand. He held the knife over the counter toward the stomach of the employee operating the register and told the employee not to move. The employee stepped back, leaving the register open. Appellant reached over and took hundreds of dollars from the register. The employee identified appellant in the courtroom as the man who robbed him.

In the second Taco Bell robbery on September 17, 2006, appellant entered the restaurant wearing the same hat and the same bandana over his face. Appellant pulled out a knife and approached the employee working at the front register. The employee backed away, toward the kitchen, and appellant followed her. Appellant told the employee to open the register. A manager stepped forward and told appellant he had the keys to the register. The manager opened the register, and appellant took the money in it. Appellant demanded that the manager open the restaurant's two other registers. The manager complied, but the registers were empty.

All the subsequent robberies followed generally the same pattern, with appellant dressed almost identically and using a knife to demand cash from registers or lock boxes.

Appellant was under surveillance when he attempted to rob the Jack in the Box restaurant for the fifth time, on October 23, 2006, and was taken into custody.

On October 24, 2006, appellant waived his rights and agreed to speak with a sheriff's deputy who was investigating the Burger King robbery. The deputy told appellant he believed appellant had robbed the Burger King, and he had surveillance video and witnesses to prove it. Appellant responded by shaking his head, saying he "really messed up." Appellant admitted to having a serious drug problem and said he had been using cocaine daily. When the deputy inquired about the Burger King robbery,

appellant said he was in enough trouble and was going away for a long time. Appellant stated, "If I admitted to what I did, then it would just make it worse." When shown photographs from the surveillance video, appellant denied it was him in the photos. Appellant asked the deputy if he would be filing charges against appellant for the Burger King robbery. The deputy replied that he was, and he asked appellant if he would be wrong in doing so. Appellant shook his head no.

The parties stipulated that some pretrial statements that witnesses made to the police and the prosecutor did not contain as much detail as their trial testimony. The parties also stipulated that two witnesses gave pretrial testimony that the robber had a tattoo on his arm and, as of October 23, 2006, appellant had no tattoo or a scar from a tattoo removal on his arms.

Appellant otherwise presented no evidence or witnesses.

DISCUSSION

1. Sufficiency of Evidence

Appellant contends that no substantial evidence supports his convictions of two of the robbery counts, namely, the robbery charge against victim Kirolos Nashed at Burger King and the robbery charge against victim Christina Williams at Taco Bell. We disagree.

Evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Hill* (1998) 17 Cal.4th 800, 848-849; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We view the evidence in the light most favorable to the respondent, and we must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Ochoa*, at p. 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) It is the exclusive province of the trier of fact to determine the credibility of a witness and the truth or falsity of the facts upon which that determination depends. (*Jones*, *supra*, at p. 314.)

"Robbery" is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The evidence, when viewed through the prism of substantial evidence review, supports appellant's conviction of the charged robberies in issue.

A. October 14, 2006 Incident

Nashed's stipulated testimony established he was working at the drive-thru register at Burger King on October 14, 2006, when a man holding a knife (appellant) appeared behind the counter, on the same side as Nashed. Nashed heard appellant tell a coemployee, Irene Idos, to "open the register." When Idos fumbled while doing so, appellant aimed the knife at her and said, "Make it fast. I need the money." Appellant then grabbed the money from the opened register. Afterward, appellant asked manager Vicki Manlapaz, who was standing next to Idos, for the "safe money." Manlapaz was trying to push an emergency button, but it was malfunctioning. Employees were running to the back of the Burger King, and customers were running outside. One of the employees stood frozen, and either Idos or Manlapaz grabbed the employee and went into the back. Nashed next saw appellant with the knife chasing Manlapaz toward the alley. Manlapaz tripped and fell. Appellant jumped over her and fled in a waiting car.

Appellant argues that the evidence supported the robbery convictions as to victims Manlapaz and Idos, but there was no evidence that any property was taken from Nashed or that any force or fear was used against him. Appellant states that Nashed was a mere observer of the incident and there was no evidence appellant was even aware of Nashed. However, when viewed in the light most favorable to the verdict, the inferences to be drawn from the evidence support appellant's conviction of robbery of Nashed. Nashed was an employee of Burger King at the time of the robbery. He testified he was working at the drive-thru register when appellant appeared with a knife on the workers' side of the counter.

The jury could infer that Nashed, as an employee of the restaurant working at a cash register, had constructive possession of the restaurant's cash, together with Idos and

Manlapaz. He was also close enough to Idos and Manlapaz to hear appellant demand that they open the register and to see the knife with which appellant was armed. The circumstances were such that the jury could reasonably conclude Nashed was also a victim of the robbery. "Two or more persons may be in joint constructive possession of a single item of personal property, and multiple convictions of robbery are proper if force or fear is applied to multiple victims in joint possession of the property taken." (*People v. Scott* (2009) 45 Cal.4th 743, 750 (*Scott*).) Regardless of whether money was taken from Nashed's register, it was sufficient that the property was taken in Nashed's immediate presence.

As our Supreme Court has explained, "it is reasonable to infer that the Legislature intended that all on-duty employees have constructive possession of the employer's property during a robbery, because such a rule is consistent with the culpability level of the offender and the harm done by his or her criminal conduct. As a matter of common knowledge and experience, those who commit robberies are likely to regard all employees as potential sources of resistance, and their use of threats and force against those employees is not likely to turn on fine distinctions regarding a particular employee's actual or implied authority. On-duty employees generally feel an implicit obligation to protect their employer's property, and their sense of loss and victimization when force is used against them to obtain the employer's property is unlikely to be affected by their particular responsibilities regarding the property in question." (*Scott, supra*, 45 Cal.4th at p. 755.)

Because robbery is an offense of violence against the person, the defendant can be convicted of robbing as many persons as against whom he used force or fear to remove the property. (*Scott, supra*, 45 Cal.4th at p. 757.) It was reasonable for the jury to conclude Nashed was prevented from retaining the restaurant's cash by his fear that appellant would harm his coworkers, even if he did not specifically testify to that fear. (See § 212 ["fear" element may be established by evidence that unlawful taking was accomplished by fear of immediate injury to someone in victim's company].)

B. September 23, 2006 Incident

The same reasoning applies to the robbery conviction as to Christina Williams on September 23, 2006, at the Taco Bell restaurant. Williams testified she was working as a cashier on that day. She was going to lunch and had clocked out on her register. As she walked to the back of the restaurant to get her purse, she observed a man holding a knife and wearing a white rag on his face run into the restaurant behind her supervisor. Williams was shocked and found the knife scary. The man gestured with the knife for the supervisor to open the cash registers, including Williams's register, and the supervisor complied. Williams watched as the man placed money from the two front registers into a bag that he carried and then leave. Williams testified she was about 10 to 15 feet away from the registers at the time.

A reasonable jury could find that the evidence satisfied the "immediate presence" requirement. The special concept of "immediate presence" has been applied broadly. (*People v. Gomez* (2008) 43 Cal.4th 249, 257.) Property is taken from a victim's "immediate presence" if taken from "'an area in which the victim could have expected to take effective steps to retain control over his property.'" (*Id.* at pp. 257-258.) This area may even be located in "'"another room of the house, or in another building on [the] premises." [Citations.]'" (*Id.* at p. 257.) Williams had only moments before left her register and was near enough to the register to witness appellant direct her supervisor with his knife to open it. Williams therefore was sufficiently close to the events that it was likely she would have taken effective steps to retain control over the money in her register had she not been in fear of appellant wielding his weapon. Consequently, there was sufficient evidence that appellant took property from Williams's "immediate presence" by force or fear.

2. Concurrent Sentences

Appellant contends that his sentences on the burglary counts should have been stayed pursuant to section 654 because the burglaries were committed with the same intent and objective as the robberies, attempted robberies and other charged felonies. We agree.

Section 654 provides that when the defendant's criminal act is "punishable in different ways by different provisions of law," the act "shall be punished under the provision that provides for the longest potential term of imprisonment" but not under more than one provision. (§ 654, subd. (a).) Section 654 thus precludes multiple punishments for a single act or indivisible course of conduct. (*People v. Ramirez* (2006) 39 Cal.4th 398, 478.) Appellant properly argues he may raise section 654 even in the absence of an objection in the trial court. (*People v. Hester* (2000) 22 Cal.4th 290, 295 [court acts in excess of jurisdiction and imposes unauthorized sentence by failing to stay execution of sentence under § 654]; see *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)

When the defendant commits more than one criminal act, section 654 has been interpreted to prohibit punishment under more than one provision if "all of the offenses were incident to one objective . . . ." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "'If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of section 654 will depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been so committed that more than one statute has been violated.'" (*Ibid.*) The rationale for the prohibition against multiple punishments is to ensure the defendant's punishment is "commensurate with his criminal liability." (*Id.* at p. 20.) Thus, one who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. (*Ibid.*)

Section 654 generally bars multiple punishment when the defendant has been convicted of both burglary and the crime defendant's entry was intended to commit. (*People v. Le* (2006) 136 Cal.App.4th 925, 931; *People v. Perry* (2007) 154 Cal.App.4th 1521, 1526.) "[B]urglary does not constitute a crime of violence unless the defendant 'inflicted great bodily injury in the commission of the burglary.'" (*Le, supra*, at p. 932.) As we have explained, "if property is taken during a burglary and a robbery pertaining to the same property is committed during the escape, the objective is still essentially to steal

the property." (*Perry, supra,* at pp. 1526-1527 [no multiple punishment when victim interrupted defendant in midst of stealing stereo from victim's car and defendant pointed screwdriver or ice pick at victim in effort to get away].) We stated that "[a]t some point, the degree of force or violence used or threatened may evince 'a different and more sinister goal than mere successful commission of the original crime,' i.e., an independent objective warranting multiple punishment." (*Id.* at p. 1527.) In the present case, there was no evidence that appellant had an "independent" or a "sinister" objective beyond taking property in the robberies, nor did he inflict great bodily injury upon any victim in the course of committing the robberies.

Respondent asserts that even if burglary is not a violent crime for purposes of the multiple victim exception, it may be treated as such when it is found the defendant personally used a *firearm* in commission of the burglary. (*People v. Centers* (1999) 73 Cal.App.4th 84, 99.) By the same token, respondent argues, burglary may be treated as a violent crime for purposes of the multiple victim exception when there is a finding that the defendant personally used a *knife*. We disagree. Unlike *People v. Felix* (2009) 172 Cal.App.4th 1618, 1630-1631, upon which respondent relies, displaying a knife during a burglary is not the same as shooting a firearm into a dwelling the defendant knows is inhabited by persons other than the intended target. In the latter case, it is foreseeable injury to an inhabitant other than the intended victim can result from the intentional discharge of a firearm into the dwelling. The evidence in *Felix* supported a finding that defendant knew it was highly likely his shooting into the home would "'probably and directly'" result in physical force against the other inhabitants. (*Id.* at p. 1630.) In *Felix*, the defendant's greater culpability for intending or risking harm to more than one person thus warranted multiple punishment. (*Id.* at p. 1631.)

The determination whether the defendant's conduct comprised divisible acts or constituted a continuous and indivisible course of conduct is a factual determination. That determination will not be disturbed on appeal unless it is unsupported by substantial evidence. When no evidence supports a conclusion the defendant acted under independent criminal objectives, however, section 654 requires a stay of the burglary

offenses. Such is the case here. The court should have stayed the sentences for counts 4, 7, 11, 15, 18, 21, 24, 27 and 29 pursuant to section 654, and, in addition to the additional modifications referred to below, the abstract of judgment should be amended accordingly.

3. Abstract of Judgment

Respondent states the abstract of judgment lists the enhancement for use of a deadly or dangerous weapon for count one only. However, the amended information charged, and the jury found true, an enhancement for use of a deadly or dangerous weapon as to all counts except for counts 8, 9 and 20.

Respondent indicates that, as to counts 2, 3, 10, 12, 13, 14, 16, 17 and 19, the court imposed as to each a sentence of one year (one-third the midterm) plus four months (one-third) for each enhancement. The abstract of judgment inaccurately combines the sentence and the enhancement, listing the base sentence on each count as one year four months, and it fails to list the enhancement at all. The abstract should separately list the one-year base term, the enhancement and the additional four-month term for the enhancement as to each such count.

Further, respondent notes the sentence the court imposed as to counts 5 and 6 actually was eight months (one-third the midterm), plus four months (one-third) for each enhancement. The abstract of judgment incorrectly combines the sentence and enhancement, listing the base sentence on each count as one year. The sentence and the enhancement for counts 5 and 6 should be listed separately.

The court also imposed concurrent midterms for counts 4, 7, 11, 15, 18 and 21 through 29, and it imposed and stayed the enhancements. The abstract of judgment lists each concurrent base term, but it does not list the stayed enhancements. Those stayed enhancements properly should be listed on the abstract of judgment.

Appellant does not oppose respondent's request for correction of the abstract of judgment.

A court, on its own motion or the motion of the parties, has inherent power to correct at any time clerical errors appearing in an abstract of judgment. (*People v.*

Mitchell (2001) 26 Cal.4th 181, 185.) An appellate court that properly assumes jurisdiction of a case may order the abstract of judgment corrected to reflect the true judgment. (*Id.* at pp. 186-188; *People v. Contreras* (2009) 177 Cal.App.4th 1296, 1300, fn. 3.) When there is a discrepancy between an oral pronouncement of judgment and the abstract of judgment, the oral pronouncement controls. (*Contreras*, at p. 1300, fn. 3; *People v. Delgado* (2008) 43 Cal.4th 1059, 1070; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3.)

The abstract of judgment should therefore be modified to reflect the correct base terms and enhancements imposed on counts 2 through 7, 10 through 19, and 21 through 29.

DISPOSITION

The judgment is affirmed, and the trial court is directed to modify and correct the abstract of judgment (1) to stay the sentences for counts 4, 7, 11, 15, 18, 21, 24, 27 and 29 pursuant section 654 and (2) to reflect the correct base terms and enhancements for counts 2 through 7, 10 through 19, and 21 through 29.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.